Supreme Court, U.S.
FILED

No. 03-269 JUN 16 2003

In The

Supreme Court of the United States

SHIREEN E. WETTERGREEN,
AGENCY CASE NO. 75-350-064, 75-350-065, 75-350-066,
75-350-067, 75-350-068, 75-350-069, 75-350-070,

Petitioner,

vs.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

SHIREEN E. WETTERGREEN, Pro Se,
374 NE 45th Street
Pompano Beach, Florida 33064
954-785-9783

83 pp

QUESTIONS PRESENTED

Introductory statement:

The issue is really whether the thirty (30) days to timely file a Petition for Review to the U.S. Court of Appeals for the Eleventh Circuit from the date of the final order of removal as required by 8 U.S.C. § 1252(b)(1) can begin to run when said final order is *improperly issued*, as opposed to the prohibition of any *tolling* of the thirty (30) days once a final order is properly issued.

1. Whether or not the time for filing a Timely Petition for Review within thirty (30) days of the Board of Immigration Appeals (BIA) May 17, 2002, Final Order of Removal as required by 8 U.S.C. § 1252(b)(1) begins to run, or valid issuance is made, when the Board of Immigration Appeals Clerk's Office mistakenly sends the Final Order Notice to the wrong address, an address other than the Address of Record of Petitioner's Counsel, in violation of the BIA's regulation which requires service of its decisions be "mailed to the appropriate party" pursuant to 8 C.F.R. §§ 3.1(f) and 3.13; the Decision of the U.S. Court of Appeals for the Eleventh Circuit on January 6, 2003, conflicting with the Decisions of three (3) other U.S. Circuit Courts of Appeals for the Second Circuit, Fifth Circuit and Ninth Circuit, (citations omitted, see below), and the subsequent Denial of Petitioner's Petition for Rehearing by the U.S. Court of Appeals for the Eleventh Circuit of March 18, 2003.

2. Whether or not improper Notice by the Clerk's Office of the Board of Immigration Appeals to Petitioner's Counsel when full compliance with BIA rules for attorney change of address and attorney of record address requirements has been met, is sufficient for a Dismissal for lack of Jurisdiction pursuant to 8 U.S.C.

QUESTIONS PRESENTED – Continued

§ 1252(b)(1) re timely filing within thirty (30) days of the BIA's May 17, 2002, Final Order of Removal when said Dismissal violates the very essence of Due Process of law which is proper and fair notice and an opportunity to be heard pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution since valid actual notice and proper issuance of said BIA Decision was not made until August 30, 2002.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

STATEMENT OF JURISDICTION

This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1), 28 U.S.C. § 2350 and INA § 242, 8 U.S.C. § 1252 and jurisdiction below at the BIA was conferred by 8 C.F.R. § 3.1(b) re the Appeal from the Decision of the Immigration Judge Denying Appellant's application for Relief from Removal/Deportation pursuant to INA § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B) – in United States in violation of law, remaining longer than permitted. Appellant filing for Asylum under INA § 208(a) and Withholding of Removal under INA § 241(b)(3), 8 U.S.C. §§ 1158 and 1251(b)(3), respectively. Further, this Court's jurisdiction is proper for the present Petition for Rehearing En Banc pursuant to F.R.A.P. Rule 35.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment to the U.S. Constitution, Due Process Clause.

2. Fourteenth Amendment to the U.S. Constitution, Due Process and Equal Protection Clauses.

STATEMENT OF THE CASE

The Board of Immigration Appeals (hereinafter BIA) entered its Final Order Decision in the above styled case on May 17, 2002, and mailed a copy of its Decision on or about May 17, 2002, to Petitioner's Counsel's former address at 4000 Hollywood Blvd., Suite 350, Hollywood, Florida 33021. Petitioner's attorney had properly complied with the BIA rules re change of address notice pursuant to 8 C.F.R. §§ 3.1(f) and 3.13. The BIA had the original Decision Notice returned to them and on August 30, 2002, reissued a Second Mailing Notice with the Decision format and Letterhead of the BIA *except* that the Clerk's Office of the BIA added a stamp in the lower right hand corner of the Decision Cover Page stating: "Board of Immigration Appeals, SECOND MAILING, Date: 8/30/2002. Initials: DLS."

This Second Notice had the correct *Address of Record* established in June, 1998, and was timely received by this attorney; this being the first such notice received by this attorney of the BIA's Decision in the above styled matter. A Petition for Review of the BIA's Decision dated August 30, 2002, was timely filed within thirty (30) days with the U.S. Court of Appeals for the Eleventh Circuit on September 26, 2002.

On October 10, 2002, the Court herein issued a Memorandum to Counsel or Parties setting forth two (2) Jurisdictional Questions, parts A and B, respectively (see a copy attached). The Court's issues re Timeliness cited *Stone v. INS*, 514 U.S. 386 (1995) which is concerned with Motions to Reopen tolling the time period to file a Petition for Review which is not what this case is about at all as noted previously in Petitioner's Counsel's Response to

Court Memorandum Re Jurisdictional Questions. The above Petitioner's Response was timely submitted on October 26, 2002. The Order of the U.S. Court of Appeals for the Eleventh Circuit, per TJOFLAT, ANDERSON and BLACK, Circuit Judges, was entered on January 6, 2002, which DISMISSED the above referenced Petition for Review for lack of jurisdiction, stating that to be timely, the petition should have been filed within thirty (30) days of the Board of Immigration Appeals May 17, 2002, final order of removal, citing 8 U.S.C. § 1252(b)(1). A timely Petition for Rehearing En Banc was filed within forty-five (45) days of the Order of the lower Court cited above pursuant to F.R.A.P. 35(c) and 11th Cir. R. 35-2. The U.S. Court of Appeals for the Eleventh Circuit entered an Order Denying Petitioner's Petition for Rehearing of the January 6, 2003 Order dismissing the Petition for Review for lack of jurisdiction, holding that, to be timely, the petition should have been filed within thirty (30) days of "the date of the final order of removal," here May 17, 2002. See 8 U.S.C. § 1252(b)(1).

STATEMENT OF THE FACTS

The Court below asked if the Petition for Review filed on September 26, 2002, was timely from the May 17, 2002, order if the "permanent rules" pursuant to INA § 242 *et seq.* govern. The BIA mailed a copy of its Notice of Decision, dated May 17, 2002, on May 17, 2002, and it was returned to the BIA. The address of this attorney on the May 17, 2002, Notice of Decision is this attorney's *former address* at 4000 Hollywood Blvd., Suite 350, Hollywood, Florida 33021. This attorney filed a proper Change of Address Notice with the BIA on June 16, 1998, on Form

EOIR-33/BIA, via the U.S. Postal Service, Express Mail, Overnight Service, Certified, Return Receipt Requested, which included this attorney's Cover Letter, on Letterhead, to the BIA, referencing the Form EOIR-33/BIA Change of Address Notice, signed by this attorney, the color copy of the U.S.P.S. Express Mail Receipt, No. EE 650227145 US, postmarked June 17, 1998; an executed copy of the Form EOIR-33/BIA Change of Address Form noting this attorney's old address (the same address the first Notice of Decision by the BIA was sent to on May 17, 2002) and this attorney's new (and current) address of 4437 Hollywood Blvd., Suite C, Hollywood, Florida 33021; with a copy of the *signed* Certified Mail, Return Receipt Card, and *stamped* on the reverse side: "Received Department of Justice, Executive Office For Immigration Review – 1998, June 18 P 1:28, Board of Immigration Appeals, Office of the Clerk"; with the last page being the reverse side of the Form EOIR-33/BIA. On August 30, 2002, the BIA on its own initiative sent a Second Mailing Notice in the above case to this attorney at his current address which is and has been since June 18, 1998, his address of record, the address at 4437 Hollywood Blvd., Suite C, Hollywood, Florida 33021. ***Please note*** the "*Special Stamp*" in the lower right corner of the BIA Notice of August 30, 2002, where it states:

> "Board of Immigration Appeals
> SECOND MAILING
> Date: 08/30/2002
> Initials: D L S"

Obviously the BIA recognized its error on its own and without any Motion or other action, apparently, moved to CORRECT ITS MISTAKE by sending the new "*Second Mailing*" notice dated August 30, 2002. Curiously, the

Court, in framing the issues above, has completely ignored this very important and key evidentiary fact in the record. The Date of the Decision remains May 17, 2002. This attorney then timely filed on September 26, 2002, a Petition for Review with this Court within thirty (30) days of receiving *actual* and *proper Notice from the BIA.*

REASONS FOR GRANTING THE PETITION

The U.S. Court of Appeals for the Eleventh Circuit's prior Decision, entered on January 6, 2003, had addressed the Issue of whether or not the Petition for Review filed on September 26, 2002, was timely from the May 17, 2002, order if the "permanent rules" pursuant to INA § 242 *et seq.* govern. It has been agreed that the permanent rules of INA § 242 *et seq.*, 8 U.S.C. § 1252(b)(1) govern this case. The answer is that the Petition for Review of the above named Petitioner was timely filed. The Court notes *Stone v. INS*, 514 U.S. at 405, 115 S. Ct. at 1549, but this case is simply not on point in that it concerns itself with the "tolling rule" when a Motion to Reconsider is filed. The key is whether "proper issuance" of the BIA's Decision was ever made before August 30, 2002, because if there is no "proper issuance" the thirty (30) day jurisdictional time limit to file the Petition for Review NEVER BEGAN TO RUN. Two (2) key cases are on point here: *Zaluski v. INS,* 37 F.3d 72 (2d Cir. 1994) and *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996). The *Zaluski* case involved a Board of Immigration Appeals (hereinafter BIA) mailing of their original Decision to the Petitioner's attorney's old address and, once the BIA learned of the error, noting that the attorney had complied with 8 C.F.R. §§ 3.1(f) and 3.13 regarding the procedures for notifying the BIA when he

changed his address, the BIA corrected it, the *Zaluski* Court stated:

> " . . . It is clear from the record, however, that the BIA's decision was first mailed to Zaluski's council at a former address. The BIA apparently learned of the error and, on October 19, 1993, mailed another copy of its decision to the lawyer's current address . . . "

This is exactly what has occurred in the instant case.

The *Zaluski* Court notes at page 73 of the above cited case:

> " . . . *In this case, we conclude that we have jurisdiction. Zaluski's attorney followed the procedures for notifying the BIA when he changed his address,* a necessary step to *preserve his* ***right*** to receive timely notice of the decision . . . " (emphasis added)

The *Zaluski* Court continued at the same page stating the following:

> " . . . The BIA's regulations, which require service of its decisions specify that decisions be 'mailed to the appropriate party'. 8 C.F.R. §§ 3.1(f), 3.13. In this case, the decision was not 'mailed to the appropriate party' (Zaluski's attorney) until October 19, when it was directed to him at the address he had duly recorded with the BIA. The petition for review was filed within 90 days of that date. Zaluski's petition therefore was timely filed, because '***the time for filing a review petition begins to run when*** *the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's]* ***address of record.***' " (emphasis added)

Again, the fact situation in *Zaluski* parallels that in the case before us. This situation with the decision date staying the same with the second Notice also occurred in *Zaluski.*

The second case on point is *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996), decided August 30, 1996. The *Martinez-Serrano* court distinguished *Stone v. INS*, 514 U.S. 386 (1995), at page 1258 of the opinion and noted on the same page in the right hand column that the issue:

> " . . . is *whether the time for filing the petition for review began to run* when the BIA mailed its decision denying the motion to reopen and reconsider to petitioner's representative's old address, *or when the BIA mailed its decision to the correct address.* More specifically, the *question is 'what does* ***"the date of issuance"*** *mean in this context?* This Circuit has not dealt with this issue.'" (emphasis added)

The Second and Fifth Circuits, however, have dealt directly with this issue and both have held that "the date of issuance" is the date the final deportation order was mailed to the correct address. *Zaluski v. INS*, 37 F.3d 72, 73 (2d Cir. 1994); *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989).

In *Zaluski*, Zaluski's attorney followed the procedures for notifying the BIA when he changed his address. *Zaluski*, 37 F.3d at 73. The BIA nevertheless mailed its decision to Zaluski's counsel's former address. *Id.* Then, "the BIA apparently learned of the error and, . . . mailed another copy of its decision to the lawyer's current address." *Id.* The Second Circuit stated that the BIA's regulations, which require service of its decisions, specify that decisions be

mailed to the appropriate party. *Id.* (quoting 8 C.F.R. §§ 3.1(f), 3.13).

It held the decision was not mailed to the appropriate party until it was directed to the address duly recorded with the BIA. *Id.* "Time for filing a review petition begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's] address of record . . . "

The Ninth Circuit in *Martinez-Serrano* then notes how the case before it is exactly like the circumstances in *Zaluski*, finding that the BIA failed to comply with the terms of the federal regulations by mailing its decision to the incorrect address.

And, **importantly**, the *Martinez-Serrano* court addresses the INS argument, stating:

> " . . . The INS concedes that the facts in *Zaluski* are similar to the facts in this case, but contends that the Second and Fifth Circuits erroneously equated 'issuance' of the final order with 'service' of the order. The INS argues that petitioner had more than ample time to file his petition for review within ninety days of the date noted on the decision. Petitioner's time to file a petition for review was shortened by a third of the time allotted for filing a review petition. He had sixty days, as opposed to ninety days, to file a review petition. The INS cites *Ashby Enterprises v. Weitzman, Dym & Assoc.*, 780 F.2d 1043 (D.C. Cir. 1986) for the proposition that the court clerk's failure to send notice of the court's judgment to the defendant does not extend time for filing a notice of appeal . . . "

The Ninth Circuit concluded in *Martinez-Serrano* that the rule in *Zaluski* and *Ouedraogo* was the correct rule to adopt and so held. The *Martinez-Serrano* court said:

> " . . . The rule in *Zaluski* and *Ouedraogo* is sound because the petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations. The BIA had petitioner's representative's correct address, yet sent the decision to the wrong address. This Court therefore has jurisdiction to review the BIA's denial of the motion to reopen and reconsider."

Likewise, the Eleventh Circuit Court of Appeals had jurisdiction to hear the pending Petition For Review filed by the above named Petitioner on September 26, 2002, within thirty (30) days of proper Notice being furnished to this attorney.

The far-reaching and devastating effects on all private practicing attorneys of any contrary ruling by this Court are made abundantly clear by the sole decision to the contrary by the U.S. Court of Appeals for the Seventh Circuit in *Nowak v. INS*, 94 F.3d 390, 391 (7th Cir. 1996) wherein in relevant part the Court there stated that the time begins to run from issuance of the Decision by the BIA, not the mailing of the Decision, *and the burden is on counsel to periodically check with the BIA to ensure no Decision was rendered and erroneously mailed.* The *Nowak* Decision, with all due respect, defies common sense and any rational procedural system of ensuring fair, timely and proper service of Notice of the BIA's Decisions. Accountability of the BIA's Clerk's Office is totally absent. Every attorney in private practice would have to become the insurance company for the BIA Clerk's Office. Every

attorney in private practice would have to notify the BIA every week or two to insure that no Decision was issued and no mistake was made. Such a result as the *Nowak* Decision defies logic, fundamental fairness, Due Process of law, and Equal Protection pursuant to the Fourteenth and Fifth Amendments to the U.S. Constitution and totally ignores the existence of the Code of Federal Regulations for proper notice of Attorney's Address of Record as cited above. It is fundamental statutory construction that no statute or regulation can be interpreted to give no meaning to the statute or regulation at issue. Further, the *Nowak* Decision is penal in character as it cuts off the entire legal rights of parties and as such must be construed very strictly, not expansively.

On January 6, 2003, the U.S. Court of Appeals for the Eleventh Circuit issued a Decision dismissing Petitioner's Petition for Review for lack of jurisdiction as it was not filed within thirty (30) days of the BIA Final Order dated May 17, 2002, pursuant to 8 U.S.C. § 1252(b)(1). Petitioner timely filed a Petition for Rehearing En Banc on February 17, 2003, which was Denied by the U.S. Court of Appeals for the Eleventh Circuit on March 18, 2003, for lack of jurisdiction for failure to timely file a Petition for Review within thirty (30) days of "the date of the final order of removal" on May 17, 2002, pursuant to 8 U.S.C. § 1252(b)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Clearly the above facts, cases, law and regulations establish the proper jurisdiction of the U.S. Court of

Appeals for the Eleventh Circuit in the above styled matter and Petitioner respectfully requests that this Court Reverse the Decision of the lower Court referenced above, entered on March 18, 2003, in the above styled matter and Grant Relief to the Petitioner, Reinstate proper jurisdiction in the above styled matter and Remand same and any and all other remedies the Court deems proper.

Respectfully submitted,

SHIREEN E. WETTERGREEN, Pro Se,
374 NE 45th Street
Pompano Beach, Florida 33064
954-785-9783

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15272-G

stamp: FILED
U.S. COURT
OF APPEALS
ELEVENTH CIRCUIT
Mar 18 2003
THOMAS K. KAHN
CLERK

SHIREEN E. WETTERGREEN, Petitioner,

versus

U.S. ATTORNEY GENERAL,
IMMIGRATION AND
NATURALIZATION SERVICE, Respondents

On Petition for Review of a Final Order of the
Board of Immigration Appeals

Before: TJOFLAT, ANDERSON, and BLACK, Circuit Judges.

BY THE COURT:

Petitioner's motion for reconsideration of our January 6, 2003, order dismissing this petition for lack of jurisdiction, is DENIED. To be timely, the petition should have been filed within 30 days of "the date of the final order of removal," here May 17, 2002. *See* 8 U.S.C. § 1252(b)(1).

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood FL 33021

March 18, 2003
Shireen E. Wettergreen v. U.S.

RE: 02-15272-G
Atty. Gen.
AGCY NO.: A75-350-064
CC: Judd Barton James
CC: Anthony Cardozo Payne
CC: David V. Bernal
CC: Clarence Maddox
CC: Administrative File
CC: Administrative File

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties
March 18, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 02-15272-G Shireen E. Wettergreen v. U.S.
Atty. Gen.
AGCY NO.: A75-350-064

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Walter Pollard (404) 335-6186

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15272-G

stamp: FILED
U.S. COURT
OF APPEALS
ELEVENTH CIRCUIT
JAN 6, 2003
THOMAS K. KAHN
CLERK

SHIREEN E. WETTERGREEN,
Petitioner,
versus
U.S. ATTORNEY GENERAL,
IMMIGRATION AND
NATURALIZATION SERVICE,
Respondents.

On Petition for Review of a Final Order of the
Board of Immigration Appeals

Before: TJOFLAT, ANDERSON, and BLACK, Circuit Judges.

BY THE COURT:

This petition for review is DISMISSED for lack of jurisdiction. To be timely, the petition should have been filed within thirty (30) days of the Board of Immigration Appeals's May 17, 2002, final order of removal. See 8 U.S.C. § 1252(b)(1). The petition, filed on September 26, 2002, is untimely.

stamp: A True Copy – Attested
Clerk, U.S. Court of Appeals
Eleventh Circuit
by: /s Walter Pollard
Deputy Clerk
Atlanta, Georgia

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood, FL 33021

January 06, 2003

RE: 02-15272-G Shireen E. Wettergreen v. U.S. Atty. Gen.
AGCY NO. A75-350-064
TO: Judd Barton James
CC: Anthony Cardozo Payne
CC: David V. Bernal
CC: John M. Bulger
CC: John Ashcroft
CC: Angela L. Green
CC: Administrative File
CC: Administrative File

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties
January 06, 2003

Judd Barton James
Hollywood Immigration Clinic, inc.
4437 Hollywood Blvd. – Suite C
Hollywood, FL 33021

RE: 02-15272-G Shireen Wettergreen v. U.S. Atty. Gen.
AGCY NO.: A75-350-064

The enclosed certified copy of this Court's order dismissing the appeal for lack of jurisdiction is issued in lieu of the mandate of this court.

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Walter Pollard (404) 335-6186
Encl.

APPENDIX C

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

October 10, 2002

MEMORANDUM TO COUNSEL OR PARTIES

RE: 02-15272-G
Atty. Gen.

Shireen E. Wettergreen v. U.S.
AGCY NO.: A75-350-064

NOTICE OF APPEAL FILED: September 26, 2002

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed. R. App. P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). Please note that the issuance of a jurisdictional question

does not stay the time for filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Walter Pollard (404) 335-6186

c: District Court Clerk

JUR-1 (2-2202)

No. 02-15272-G

JURISDICTIONAL QUESTION(S)

I. What law governs judicial review of this petition for review:

A. The "permanent rules" in Immigration and Nationality Act ("INA") § 242 *et seq.* (8 U.S.C. § 1252 *et seq.*), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") § 306(a)(2), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); or

B. The "transitional rules" in INA § 106 (8 U.S.C. § 1105a) and IIRIRA § 309(c)(4) (note to 8 U.S.C. § 1101)?

See IIRIRA §§306(c)(1), 309(a) & (c)(1), as amended by technical correction Pub. L. 104-302, §2, 110 Stat. 3657 (Oct. 11, 1996): *Lettman v. Reno*, 168 F.3d 463 (11th Cir.), *vacated in part and reh'g granted*, 185 F.3d 1216 (11th Cir. 1999).

II. *Timeliness*

A. If the transitional rules govern, whether the petition for review, filed on September 26, 2002, was timely from the May 17, 2002, order? See § 309(c)(4)(C); R. Fed. R.

App. P. 15(a)(1) & 26(b)(2); *Stone v. INS*, 514 U.S. 386, 405, 115 S. Ct. 1537, 1549, L. Ed. 2d 465 (1995).

B. If the permanent rules govern, whether the petition for review, filed on September 26, 2002, was timely from the May 17, 2002, order? See INA § 242(b)(1); Fed. R. App. P. 15(a)(1) & 26(b)(2); *Stone*, 514 U.S. at 405, 115 S. Ct. at 1549.

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood, FL 33021

October 10, 2002

RE: 02-15272-G Shireen E. Wettergreen v. U.S. Atty. Gen.
AGCY NO.: A75-350-064
CC: Judd Barton James
CC: John M. Bulger
CC: John Ashcroft
CC: Angela L. Green
CC: Administrative File

APPENDIX D

Seal: Department of Justice
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

James, Judd, Esq.
4437 Hollywood
Blvd., Suite C
Hollywood, FL 33021

Office of the District Counsel/MI
155 So. Miami Ave., Rm. 500
Miami, FL 33130

Name: WETTERGREEN, SHIREEN E A75-350-064
Riders: 75-350-065 75-350-066 75-350-067 75-350-068 75-350-069 75-350-070

*D*ate of this notice: 08/30/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s Lori Scialabba
Chairman

Enclosure

Board of Immigration Appeals
SECOND MAILING
Date: 8/30/2002
Initials: DLS

Panel Members:
COLE, PATRICIA A.
HESS, FRED
THOMAS ELLEN K.

Seal: Department of Justice
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

James, Judd, Esq.
4437 Hollywood
Blvd., Suite C
Hollywood, FL 33021

Office of the District Counsel/MI
155 So. Miami Ave., Rm. 500
Miami, FL 33130

Name: WETTERGREEN, SHIREEN E A75-350-064
Riders: 75-350-065 75-350-066 75-350-067 75-350-068 75-350-069 75-350-070

*D*ate of this notice: 05/17/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s Lori Scialabba
Acting Chairman

Enclosure

Panel Members:
COLE, PATRICIA A.
HESS, FRED
THOMAS ELLEN K.

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church,
Virginia 22041

Decision of the Board
of Immigration Appeals

Files: A75 350 064 – Miami
A75 3350 065
A75 350 067
A75 350 068
A 75 350 069
A 75 350 070

Date: May 17 2002
(stamp)

In re: SHIREEN E. WETTERGREEN
ROBERT M. WETTERGREEN
ROBYN S. WETTERGREEN
AMY J. WETTERGREEN
MARGARET O. WETTERGREEN
ELOISE E. WETTERGREEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Judd James, Esquire
ON BEHALF OF SERVICE: Milton Aponte
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] –

In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal.

ORDER:

PER CURIAM. The respondents appeal the Immigration Judge's January 5, 1998 decision denying their application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act. 8 U.S.C. §§ 1258 and 1231(b)(3). The appeal is dismissed.

We have reviewed the evidence of record along with the Immigration Judge's thorough decision denying the respondents' application for asylum and withholding of removal under the Act and agree that the respondents have failed to establish either a well-founded fear of persecution and/or a likelihood that they will be persecuted upon return to South Africa "on account of" a ground enumerated in the Act. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). In particular, we agree that the respondents claim for relief is based solely upon the general state of violence and lawlessness in South Africa stemming from the May 1994 change in government (I.J. Dec. at 6). *See Matter of T-*, 20 I&N Dec. 571, 578 (BIA 1992). Moreover, we concur with the Immigration Judge in his finding that the country reports contained in the record indicate that South Africans are generally not at risk of being the victims of violence perpetrated solely due to the color of their skin, as the respondents claim (Exh. 6). Rather, individuals such as the respondents, i.e. apolitical white men and women, are far less likely to be the victims of violence and crime. *Id.* As a result, we concur in the Immigration Judge's decision concluding that the respondents have failed to sustain their burden of proof. *See Cardoza-Fonseca v. INS*, 408 U.S. 421 (1987) (standard of proof governing asylum); *INS v. Stevic*, 467 U.S. 407 (1984) (standard of proof governing withholding under the Act).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondents are permitted to voluntarily depart from the United States, without expense to the

Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 249B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the respondents fail to so depart, the respondents shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondents fail to depart the United States within the time period specified, or any extensions granted by the district director, the respondents shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

/s Frederick D. Hess
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

JUDD JAMES, ESQ.
HOLLYWOOD IMMIGRATION CLINIC, INC.
4000 HOLLYWOOD BLVD, STE 350
HOLLYWOOD FL 33021

IN THE MATTER OF FILE A 75-350-064
WETTERGREEN, SHIREEN E DATE: Jan 5, 1998

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
APPEALS PROCESSING UNIT
5107 LEESBURG PIKE, SUITE 1711
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION/REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3). IF YOU FILE A MOTION TO

REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
155 SOUTH MIAMI AVENUE., ROOM 800
MIAMI, FL 33130

X OTHER: Immigration Judge Decision.

/Signature
COURT CLERK
IMMIGRATION COURT FF

CC:

SLH

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF:

WETTERGREEN, SHIREEN E.	FILE NO.: A75 350 064
WETTERGREEN, ROBERT M.	A75 350 065
WETTERGREEN, SUSAN E.	A75 350 066
WETTERGREEN, ROBYN S.	A75 350 067
WETTERGREEN, AMY J.	A75 350 068
WETTERGREEN, MARGARET O.	A75 350 069
WETTERGREEN, ELOISE E.	A75 350 070

IN REMOVAL PROCEEDINGS

---/

On Behalf of Respondents: Judd James, Esquire

On Behalf of Service: Stephen J. DeRenzo, A.D.C.

Charge: Sec. 237(1)(1)(B) of the Immigration and Nationality Act

Applications: Asylum, withholding of removal, voluntary departure

DECISION OF THE IMMIGRATION JUDGE

The respondents, a husband and wife and their five children, are all natives and citizens of South Africa (SA). On June 12, 1997, the Immigration and Naturalization Service (the Service) served the respondents with Notices To Appear charging them with removability under section 237(a)(1)(B) of the Immigration and Nationality Act (the Act). See Exhibit 1. At a master calendar hearing on July 1, 997, the respondents, through counsel, admitted all of the allegations in the Notices To Appear and conceded removability. The Court finds, therefore, that the respondents are removable from the United States pursuant to Section 240(c) of the Act. The only remaining issues are the respondents' application for asylum and for withholding of removal (see Exhibit 2) and voluntary departure.

The record also contains an Advisory Opinion dated September 23, 1997, prepared by the Department of State, Bureau of Democracy, Human Rights and Labor (Exhibit 5) and the Department of State's *Country Reports on Human Rights Practices* (*Country Reports*) (Exhibit 6).

At the hearing on October 16, 1997, the two adult respondents testified in support of their application for asylum and for withholding of removal. The lead respondent testified first.

On direct examination by her counsel, the respondent testified that she was born on June 24, 1954 and lived in South Africa until reaching the age of 39. She testified that her spouse was admitted to the United States on

August 29, 1994 as a H-1B nonimmigrant temporary worker and that the family entered in H-4 status. The respondent was asked if there was any one thing that made her decide not to return to SA when her status expired. She could not recall. The respondent was asked why she has a subjective fear of returning to SA. She answered, "After having seen many reports, newspaper cuttings, and speaking to friends, it seems that things in SA are certainly not a rosy picture.: She added that she fears persecution based on the color of her skin. The respondent was asked if there was anything in her past experience before she left SA that contributed to her fear. She replied, "There were many incidents . . . I never really had anything personally happen to me, but what was going around me, people in the area., did raise of lot of apprehension about what was taking place." The respondent gave six examples. First, she told the story of a close friend who was stabbed 87 times, while driving his BMW sports car, by 5 black men. Neither the friend's car, jewelry or wallet were taken during this incident which occurred 18 months prior to the respondent's departure. Next, the respondent recounted that her husband's uncle was attacked 5 times in three years on his farm by black men. Thirdly, the respondent told the story of her brother, Baxter Harrower who experienced numerous attacks on his family always by black men. The brother committed suicide along with his wife and child. Next, the respondent testified about another brother, Ashley Harrower, who became involved in an altercation between two of his employees who were both black men. After the police arrived on the scene the respondent's brother was taken to the police station. The respondent testified that the only reason that her brother was arrested was because he was white and the policemen were black. The respondent gave

as another example the story of her mother-in-law who lost a lot of valuable jewelry during a home burglary. Finally, the respondent testified about an incident involving her husband wherein he was pulled out of his car by two black men who stripped him of his clothes and beat him causing him injuries which had to be treated at a hospital. The respondent testified that this incident took place 6-7 years prior to coming to the US in 1994. The respondent characterized all six of these episodes are being racially motivated because on each occasion the perpetrators were black and the victims white. The respondent also testified that "whites don't have the protection under the African National Congress that they once had when the National Party ran the government." The respondent testified that she wasn't responsible for apartheid and "now apartheid has been done way with, and is just a word, and blacks want payback." The respondent declared that she is a non-political person and a pacifist. When asked if she knew of any incident that crystallizes her sentiment the respondent cited the case of American Amy Biehl who was killed by a black mob. The respondent was asked if the government was taking any steps to protect the white minority. She replied that the police ad the judiciary are corrupt and motivated by racist attitudes. The respondent also testified about discrimination in education and medicine citing the firing of 6,000 white teachers and many white doctors replaced by non-English speaking Cuban doctors. She also complained about affirmative actions for blacks. Asked if there was any safe place to go in SA the respondent replied, "You're not safe in a beach, pub, not in a swimming pool, not in a church." The respondent was asked if there was anything in particular she feared being a female. She answered, "Yes, rape," and gave the statistic that there were 66 reported

rapes in one province alone during the first two weeks of August of 1997. The respondent was asked if she was aware if any of these reported rapes were racially motivated. She replied, "Black men wanting to rape white girls would be a big fear of mine because you don't actually turn black men down . . . especially those . . . they feel they have every right to approach and be accepted by any woman irrespective of their color and that's not the way we do things."

On cross-examination by the Service, the respondent was asked why she didn't claim asylum as soon as she arrived in the US. She replied because she wanted to get all of her personal belongings our of the country first. The respondent was asked if she belonged to any organizations in South Africa. She replied in the negative. The respondent was asked if anyone was apprehended for the stabbing incident. She answered yes. She was asked, if they were punished after being prosecuted. She replied yes. The respondent was asked if the stabbing incident took place at a time when the white government was still in power. She answered in the affirmative. Regarding the numerous attacks on her brother, the respondent was asked if she had any copies of police reports about the attacks. She responded that she didn't know if the attacks were reported. The respondent was asked if her brother's suicide took place during the time period when the white government still ruled in SA. She said yes. The respondent was asked if she had been present during any of the six episodes that she recounted and maintains were racially motivated. She replied in the negative. The respondent was asked how she knew that the perpetrators were black if she was not present at any of these criminal episodes. She said, "Chances are that the persons would be black

are extremely high." The respondent was asked if it was a fact that her husband's attack occurred during a period of white rule in SA. She said yes. The respondent was asked if she had any copies of police reports or hospital reports relating to the husband's attack. She said no. The respondent was asked whether SA was a democracy. She replied, "We're not represented in the government, SA is not democratic at all." How do you know if you don't vote the respondent was asked. "I don't vote but I still have an opinion to pass" she replied. The respondent was asked if the crime and violence that she complained about existed in black communities as well. She replied that crime and violence are everywhere. Regarding her statement that the police is corrupt the respondent was asked if she had ever had occasion to summon the police for assistance in the years before black rule. She replied, in 1992 or 1993 but could not recollect more. The respondent was asked if the killers of Amy Biehl were brought to trial. She answered yes. Regarding affirmative action for blacks, the respondent was asked whether it was true that unemployment is higher for blacks than for whites. The respondent replied, "As far as I'm concerned, affirmative action does not benefit majority groups irrespective of whether they have jobs or not." With respect to rape, the respondent was asked if she agreed that anyone, black or white, male or female, can rape a woman. She answered yes. The respondent was asked if, apart from black men, was she also fearful of white men raping her daughters in SA. The reply was, "A white man wouldn't say I have the right to your body just because I prefer it. A black man would."

The only other witness that testified at the hearing was the respondent's spouse, Robert M. Wettergreen. On direct examination by his counsel, the respondent testified

that he lived in SA all his life until coming to the US on a H-1B visa in 1994. He was asked if he had ever been attacked by a black man in SA. He testified that he was attacked and robbed by two black men who uttered the work "umlugu" which means white man in the Zulu language. He further testified that on another occasion, while jogging, he saw 5 or 6 black men walking toward him from out of the bush. He added, "You do not go near certain areas, they will get you if you have a dollar or a rand." The respondent urged the court, "send me but don't send the girls." The respondent testified that he was a bank manager for 10-12 years who supervised 45 employees. When asked if anything in particular swayed him to seek asylum in the US the respondent replied, "reports." The respondent opined that the police in SA cannot protect him due to the fact that there are too many competing forces. The respondent testified that he would fear violence from the Afrikaner Weerstandbeweging (AWB) as well because he's an Englishman.

On cross-examination, the Service asked the respondent why he waited three years after coming to the US to apply for asylum. He responded that he was waiting on the results of a visa petition filed by Plastic USA Corp., which is owned by his spouse's brother. The respondent was asked if he could produce corroboration of his attack in the form of police and hospital records. He answered in the negative. The respondent was asked if he had been a target in the attack because he is white. He was not sure. He was asked if the incident could be attributed to being in the wrong place at the wrong time. He replied in the affirmative. He testified that he does not know the motivation of his attackers. He added the following: "There are so

many of them. They're all unemployed. It's their livelihood."

An applicant for asylum and for withholding of removal has the burden to establish that he has been subject to past persecution, has a well-founded fear of persecution, or has established a clear probability of persecution within the meaning of sections 208 and 241(b)(3) of the Act. An applicant must show that the harm suffered in the past. or feared in the future, was or would be inflicted on account of his race, religion, nationality, membership in a particular social group or political opinion. See section 101(A)(42)(a) OF THE Act. *See* also *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

In this case, the respondents, a white South African family, allege persecution on account of their race by black South Africans whom the government of South Africa is either unable or unwilling to control. The respondents base their claim on statistics and. to a very limited extent, their personal experiences. It is the opinion of this court that the respondents have failed to meet their burden of proof in order to qualify for asylum in this case.

First, although it may be an element of the proof, a purely statistical showing is not by itself sufficient proof of the existence of a persecuted group. It is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. There must be a showing that the claimed persecution is on account of the group's identifying characteristics. *See* Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985). The respondents have not made such a showing. The only family member to experience mistreatment in SA was the male respondent. However, in his testimony, the respondent was

unsure if race was the motivation behind his attack. There are no hospital or police reports that might have shed some light on the respondent's racial-persecution theory. The respondent testified that persons dare not go into certain areas or "they will get you if you have a dollar or a rand." This testimony suggests that the respondent's race was not the cause of his attack, rather, that the respondent, regrettably, was in the wrong place at the wrong time.

Second, nothing in the other six respondents' own personal experiences reasonably leads one to the conclusion that whites in South Africa are being persecuted by blacks because of their race. There was not testimony that any of the other family members have ever been arrested or personally attacked by anyone in SA. In fact, the respondents' counsel stated that "the respondents are not claiming past persecution, only a well-founded fear of persecution.

Moreover, none of the six stories recounted by the female respondent shed much light on the respondents' race-based persecution theory. Accounts of these incidents are for the most part sketchy and lacking in sufficient detail to provide a plausible and coherent account of the bases for the respondent's fear. *See Matter of Mogharrabi*, supra. The respondent was not present during any of the incidents that she described. There was no evidence presented that reasonably establishes that the victims were subjected to mis-treatment because they were white. The record is silent as to whether the victims had ever been subject to attacks by persons other than "black men." An applicant for asylum is not obliged to show conclusively why persecution has occurred o may occur; however, in proving past persecution, the applicant must produce

evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground. *See Matter of S-P-*, Interim Decision 3287 (BIA 1996.) Here, even though the respondents are not claiming past persecution themselves, they are relying on the past persecution of others to state their claim. The testimony and evidence do not demonstrate racial persecution, rather they demonstrate that crime and lawlessness are common occurrences in SA. In this respect, however, SA is no different from the US. The male respondent testified that he fears violence not only from blacks but from the AWB as well. Therefore, the respondents' real fear if of harm resulting from crime and violence committed by anyone. Harm arising from general civil strife does not amount to persecution within the meaning of the Act. *See, e.g., Matter of Sanchez and Escobar*, supra.

In addition, the respondents testimony does not indicate an inability or unwillingness on the part of the black ruling government either to prosecute black defendants or to protect white citizens as the respondents contend in this case. As brought out on cross-examination, when incidents of mis-treatment were reported to the proper authorities, the police investigated and apprehended suspects who were prosecuted, convicted and ultimately sentenced. Moreover, many of the incidents recounted by the respondents occurred prior to blacks gaining political control in SA. Thus, the evidence shows, crime existed under white-rule and continues to be a factor under black-rule. White the reasons that crime exists are complex, the respondents have not demonstrated a nexus between persecution, past or future, and race as they are required to do.

All of the incidents described by the respondents must be viewed alternatively as functions of the change in government which took place in May of 1994, isolated instances of crime, or random acts of discrimination. Contrary to the respondents' position in this case, crime affects *all* of South Africa's citizens, white and black. As such, it is not a basis for persecution here. *See Matter of Sanchez and Escobar*, supra. Nor is discrimination.

The court's conclusion in this case that the respondents have not shown past persecution or a well-founded fear of persecution on account of their race is further supported by the Department of State Advisory Opinion (Exhibit 5) read in conjunction with the Country Reports (Exhibit 6). The Advisory Opinion does not attribute high crime in South Africa to racial hatred and black "persecution" of whites and, additionally, notes that several million white South Africans remain there. The Advisory Opinion goes on to state that "It does not appear that racial or ethnic groups in South Africa are being targeted by criminals for political reasons. Anecdotal and statistical evidence indicates that black South Africans are still the principal victims of violent crime and that the highest crime rates continue to be in the black townships established during the apartheid era where most urban blacks still live." Country reports submitted by the Department of State's Bureau of Democracy, Human Rights and Labor are entitled to considerable deference. *See Matter of T-M-B-*, Interim Decision 3307 (BIA 1997).

Finally, Exhibit 6 at Tab 7, analyzes whether evidence exists that white South Africans are being persecuted due to race as follows: "White it would be incorrect to say that no white South African could possibly be at risk solely because of the color of his/her skin, all of the sources

available to the Resource Center indicate that the risk for apolitical whites is far lower than for any other racial or political group in South Africa statistically the risk is well under 1 in 1,000 for white South Africans with no political affiliations." This is especially relevant to this case because the respondents have no known political affiliations.

On a procedural note, the respondents were given from October 16, 1997, until December 1, 1997, to rebut Exhibit 6. The respondents requested a 10 day extension of time to rebut Exhibit 6 which the Service opposed. The court granted the respondents until December 10, 1997. On December 17, 1997, the respondents filed another motion for extension of time which the Service also opposes. The motion was filed out of time. The respondents have had ample opportunity to file their rebuttal. Respondents' rebuttal will not be considered as it is untimely.

After considering the respondents' testimony, their Form I-589, and other evidence of record, the court finds that the respondents have failed to establish eligibility for asylum on account of race.

Inasmuch as the respondents have failed to satisfy the lower burden of proof required for asylum, it follows that they have also failed to satisfy the clear probability standard of eligibility for withholding of removal. The evidence does not establish that it is more likely than not that the respondents would be subject to persecution on account of one of the five grounds specified in Section 241(b)(3)(A) of the Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, supra.

With respect to the issue of voluntary departure, the court finds that the respondents are statutorily eligible for this form of relief in that (1) they have been physically

present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a); (2) they are, and have been, persons of good moral character for at least 5 years immediately preceding this application for voluntary departure; (3) they are not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4) and (4) they have established by clear and convincing evidence that they have the means to depart the United States and have the intention to go. In addition, the court finds that the respondents should be granted such relief, in lieu of removal, as a matter of discretion.

Accordingly, the following orders are entered:

ORDER

IT IS HEREBY ORDERED that the respondents' application for asylum be denied.

IT IS FURTHER ORDERED that the respondents' application for withholding of removal be denied.

IT IS FURTHER ORDERED that the respondents be permitted to voluntarily depart the United States at their own expense within 60 days, in lieu of removal, and that if the respondents fail voluntarily to depart the United States, within the time period specified, they shall be subject to a civil penalty of not less than $1,000 and nor more than $5,000 and be ineligible for a period of 10 years for any further relief including voluntary departure, cancellation of removal, adjustment of status and change of status.

IT IS FURTHER ORDERED that the respondents shall each be required to post a voluntary departure bond

in the amount of $500.00, payable by money order, within 5 business days of this order, with the INS District Director, 7880 Biscayne Boulevard, 9th floor, in Miami, Florida, and that if the respondents fail to post the bond in the manner described, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day.

Dated on this the 5th day of January, 1998.

Appeal is due on or before : February 4, 1998.

/signature
SCOTT G. ALEXANDER
Immigration Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Decision of the Immigration Judge was served on the parties by U.S. Mail on this 5th day of January, 1998.

/signature
Sheryl L. Hampton
Immigration Clerk

75 350 070 Wettergreen, Eloise E
75 350 069 Wettergreen, Margaret O
75 350 068 Wettergreen, Amy J
75 350 067 Wettergreen, Robyn S
75 350 066 Wettergreen, Susan E
75 350 065 Wettergreen, Robert M
Alien Number: 75-350-064 Alien name: Wettergreen, Shireen E

LIMITATION ON DISCRETIONARY RELIEF
FOR FAILURE TO APPEAR

( ) (1) You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exception circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years from the date of your scheduled hearing.

(X) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exception circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for ten 910) years from the date of the scheduled departure or the date of unlawful reentry, respectively. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

( ) 4 An order of. . . . has been entered against you. If you fail to appear pursuant to a final . . . of . . . at the

time and place ordered by the INS, other than because of exception circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for ten (10) years after the date you are scheduled to appear.

** the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act;

3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date: January 5, 1998
Immigration Judge: ALEXANDER or Court Clerk ___

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (X) ALIEN'S ATT/REP (X) INS
DATE: 1-5-08 BY: COURT STAFF /signature
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

APPENDIX F

CASE NO. 02-15272-G
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHIREEN E. WETTERGREEN,
Petitioner
v.
JOHN ASHCROFT, ATTORNEY GENERAL,
Respondent

PETITION FOR REHEARING
EN BANC

On Appeal from the Decision of the U.S. Court of
Appeals for the Eleventh Circuit

BRIEF OF PETITIONER
SHIREEN E. WETTERGREEN
EN BANC HEARING

Judd B. James, Esq.
Attorney for Petitioner
4437 Hollywood Blvd.,
Suite C
Hollywood, FL 33021
Tel: 954-894-6700
FAX: 954-893-0927
Illinois Bar No. 06181629

Shireen E. Wettergreen, Petitioner v. John Ashcroft, Attorney General, Respondent

CERTIFICATE OF INTERESTED PERSONS

The following is a complete list of persons who have an interest in the outcome of this particular case:

John Ashcroft,. Attorney General, Respondent
David V. Bernal, Attorney, U.S. Department of Justice
Anthony Cardozo Payne
John Bulger, INS District Director, Division VI, Florida District
Walter Pollard, Deputy Clerk, U.S. Court of Appeals for the Eleventh Circuit
Angel Green
U.S. Circuit Judge Tjoflat, Eleventh Circuit Court of Appeals
U.S. Circuit Judge Anderson, Eleventh Circuit Court of Appeals
U.S. Circuit Judge Black, Eleventh Circuit Court of Appeals
Thomas K. Kahn, Clerk, U.S. Court of Appeals for the Eleventh Circuit
Shireen E. Wettergreen, Petitioner
The Honorable Scott G. Alexander, Immigration Judge
Judd James, Petitioner Counsel

CERTIFICATE OF QUESTION(S) OF EXCEPTION IMPORTANCE

I, Judd James, counsel for Petitioner Shireen Wettergreen in the above styled matter, express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance pursuant to 111th Cir. R. 35-6(c), to-wit:

1. That the issue presented of whether proper Notice by the BIA Clerk's Office of the Decision of the Board to the Petitioner attorney's address of record triggers "proper issuance" of the thirty (3) day jurisdictional time to file a Petition for Review is of

paramount importance to every attorney, the proper administration of justice and fundamental fairness since a contrary result would shift the burden to attorneys to be responsible for mistakes by the BIA's Clerk's Office, a clearly intolerable, impractical and unjust result if the above Decision of 01-06-03 by this Court in this matter is upheld. (See Statement of Issues.)

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Respondent does not request oral argument. Counsel believes that the briefs and record adequately present the facts and legal arguments, and that oral argument is therefore unnecessary. However, if the Court finds that oral argument would be of assistance, Respondent reserves the right to participate in oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Eleventh Circuit Rule 32(a)(7)(c), and 35-1, I certify that the Petitioner's Brief complies with the type-volume limitations in Rule 32(a)(7)(B)(i), insofar as it is printed in 14-point Times New Roman and, pursuant to 11th Cir. R. 35-1, and I.O.P. (2) does not exceed fifteen (15) pages.

* * *

APPENDIX

Copy of Order of U.S. Court of Appeals for The Eleventh Circuit, Case No. 02-15272-G, Shireen Wettergreen v. U.S. Attorney General, Immigration and Naturalization Service, dated 01-06-2003, Per Circuit Judges Tjoflat, Anderson and

Black, Dismissing Petition for Review for lack of jurisdiction.

STATEMENT OF JURISDICTION

This Court's jurisdiction is conferred by INA Section 242, 8 U.S.C. Section 1252 and jurisdiction below at the BIA was conferred by 8 C.F.R. Section 3.1(b) re the Appeal from the Decision of the Immigration Judge Denying Appellant's application for Relief from Removal/Deportation pursuant to INA Section 241(a)(1)(B), 8 U.S.C. Section 1251(a)(1)(b) – In United States in violation of law, remaining longer than permitted. Appellant filing for Asylum under INA Section 208(a) and Withholding of Removal under INA Section 241(b)(3), 8 U.S.C. Sections 1158 and 1251(b)(3), respectively. Further, this Court's jurisdiction is proper for the present Petition for Rehearing En Banc pursuant to F.R.A.P. Rule 35(c) and 11th Cir. R. 35-2 in that it is timely filed within forty-five (45) days of entry of judgment by this Court in the above styled matter on 01-06-03 as the United States or an agency of officer thereof is a party.

PETITION FOR REHEARING EN BANC

ISSUES:

I, Judd James, attorney of record for Petitioner Shireen E. Wettergreen, et. al., express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance, to-wit:

1. Whether or not the time for filing a Timely Petition For Review within thirty (30) days of the Board of

Immigration Appeals (BIA) May 17, 2002 Final Order of Removal as required by 8 U.S.C. Section 1252(b)(1) begins to run, or valid issuance is made, when the Board of Immigration Appeals Clerk's office mistakenly sends the Final Order Notice to the wrong address, an address other than the Address of Record of Petitioner's Counsel, in violation of the BIA's regulation which requires service of its decisions be "mailed to the appropriate party pursuant to 8 C.F.R. Sections 3.1(f) and 3.13; the Decision of this Court on 01-06-2003 conflicting with the Decisions of three (3) other U.S. Circuit Courts of Appeal for the 2nd Circuit, 5th Circuit and 9th Circuit, (citations omitted, see below).

2. Whether or not improper Notice by the Clerk's Office of the Board of Immigration Appeals to Petitioner's Counsel when full compliance with BIA rules for attorney Change of Address and attorney of record address requirements has been met, is sufficient for a Dismissal for lack of Jurisdiction pursuant to 8 U.S.C. Section 1252(b)(1) re timely filing within thirty (30) days of the BIA's May 17, 2002 Final Order of Removal when said Dismissal violates the very essence of Due Process of law which is proper and fair notice and an opportunity to be heard pursuant to the 5th and 14th Amendments to the U.S. Constitution since valid actual notice and proper issuance of said BIA Decision was not made until 08-30-2002.

STATEMENT OF THE ISSUES BY THE COURT FROM WHICH REHEARING IS SOUGHT

ISSUE NO.

1. What law governs judicial review of this petition for review:

A. The "permanent rules" in Immigration and Nationality Act ("INA") Section 242 *et seq.* (8 U.S.C. Section 1252 *et seq.*), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA") Section 306(a)(2), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); or

B. The "transitional rules" in INA Section 106 (8 U.S.C. Section 1105a) and IIRIRA Section 308(c)(4) (note to 8 U.S.C. Section 1101)?

See IIRIRA Section 306(c)(1), 309(a) & (c)(1), as amended by technical correction Pub. L. 104-302, Section 2, 110 Stat. 3657 (Oct. 11, 1996) *Lettman v. Reno*, 168 F.3d 463 (11th Cir.) *vacated in part and reh'g granted*, 185 F.3d 1216 (11th Cir. 1999).

II Timeliness

A. If the transitional rules govern, whether the petition for review, filed on September 26, 2002, was timely from the May 17, 2002 order? See Section 309(c)(4)(C); Fed. R. App. P. 15(a)(1) & 26(b)(2); *Stone v. INS*, 514 U.S. 386, 405, 115 S. Ct. 1537, 1549, 131 L. Ed. 2d 465 (1995).

B. If the Permanent rules govern, whether the petition for review, filed on September 26, 2002 was timely from the May 17, 2002, order? *See* INA Section 242(b)(1); Fed. R. App. P. 15(a)(1) & 26(b)(2); *Stone*, 514 U.S. at 405, 115 S. Ct. at 1549.

STATEMENT OF THE COURSE OF PROCEEDINGS

The Board of Immigration Appeals (hereinafter BIA) entered its Final Order Decision in the above styled case on 05-17-2002 and mailed a copy of its Decision on or about 05-17-2002 to Petitioner's Counsel's former address at 4000 Hollywood Blvd., Suite 350, Hollywood, Florida 33021. Petitioner's attorney had properly complied with the BIA rules re change of address notice pursuant to 8 C.F.R. Sections 3.1(f) and 3.13 as is evidenced by the attached copies of this attorney's cover letter dated 06-16-1998 citing the Form EOIR-33/BIA, (see a copy attached) as well as the U.S.P.S. Express Mail Notice dated 06-17-1998, Green Certified Return Receipt Card from the U.S.P.S. file-stamped by the BIA on 06-18-1998 and the outside mailing cover and addresses of Form-33/BIA. The BIA had the original Decision Notice returned to them and on 08-30-2002 re-issued a Second Mailing Notice with the Decision format and Letterhead of the BIA *except* that the Clerk's Office of the BIA added a stamp in the lower right hand corner of the Decision Cover Page stating: "Board of Immigration Appeals, SECOND MAILING, Date: 8/30/2002. Initials: DLS." This Second Notice had the correct *Address of Record* established in June, 1998 and was timely received by this attorney; this being the first such notice received by this attorney of the BIA's Decision in the above styled matter. A Petition for Review of the BIA's Decision dated 08-30-2002 was timely filed within thirty (30) days with the U.S. Court of Appeals for the Eleventh Circuit on 9-26-2002. On 10-10-2002 the Court herein issued a Memorandum To Counsel Or Parties setting forth two (2) Jurisdictional Questions, parts A and B, respectively (see a copy attached). The Court's issues re Timeliness cited *Stone v. INS*, 514 U.S. 386 (1995) which is concerned with Motions to Reopen tolling the time period to file a Petition

for Review which is not what this case is about at all as noted previously in Petitioner's Counsel's Response to Court Memorandum Re Jurisdictional Questions. The above Petitioner's Response was timely submitted on 10-26-2002. The Order of the U.S. Court of Appeals for the Eleventh Circuit, per TJOFLAT, ANDERSON and BLACK, Circuit Judges, was entered on 01-06-2002 which DISMISSED the above referenced Petition for Review for lack of jurisdiction, stating that to be timely, the petition should have been filed within thirty (30) days of the Board of Immigration Appeals May 17,2002, final order of removal, citing 8 U.S.C. Section 1252(b)(1). This Petition for Rehearing En Banc follows and is timely filed with forty-five (45) days of the Order of this Court cited above pursuant to F.R.A.P. 35(c) and 11th Cir. R. 35-2.

STATEMENT OF THE FACTS

The Court herein asks if the Petition for Review filed on September 26,2002 was timely from the May 17,2002 order if the "permanent rules" pursuant to INA Section 242 *et seq*. govern. The BIA mailed a copy of its Notice of Decision, dated 05-17-2002, on 05-17-2002 and it was returned to the BIA, as the copy of the returned envelope attached to the Decision included with the Petition for Review shows. The address of this attorney on the 05-17-2002 Notice of Decision is this attorney's *former address* at 4000 Hollywood Blvd., Suite 350, Hollywood, Florida 33021. This attorney filed a proper Change of Address Notice with the BIA on June 16,1998 on Form EOIR-33/BIA, via the U.S. Postal Service, Express Mail, Overnight Service, Certified, Return receipt Requested. Please see attached a complete copy, (pages 1-5, part of which is in color) of this attorney's Cover Letter, on Letterhead, to

the BIA, referencing the Form EOIR-33/BIA Change of Address Notice, signed by this attorney, the color copy of the U.S.P.S. Express Mail Receipt, No. EE 650227145 US, postmarked June 17,1998; an executed copy of the Form EOIR-33/BIA Change of Address Form noting this attorney's old address (the same address the first Notice of Decision by the BIA was sent to on 05-17-2002) and this attorney's new (and current) address of 4437 Hollywood Blvd., Suite C, Hollywood, Florida 33021; with a copy of the *signed* Certified Mail, Return Receipt Card, and *stamped* on the reverse side: "Received Department of Justice, Executive Office For Immigration Review-1998, June 18 P 1:28, Board of Immigration Appeals, Office of the Clerk; with the last page being the reverse side of the Form EOIR-33/BIA. On August 30, 2002, the BIA on its own initiative sent a Second Mailing Notice in the above case to this attorney at his current address which is and has been since 06-18-1998, his address of record, the address at 4437 Hollywood Blvd., Suite C, Hollywood, Florida 33021. ***Please note*** the "*Special Stamp*" in the lower right corner of the BIA Notice of 08-30-2002, where it states:

> "Board of Immigration Appeals"
> SECOND MAILING
> Date: 08/30/2002
> Initials: D L S"

Obviously the BIA recognized its error on its own and without any Motion or other action; apparently, moved to CORRECT ITS MISTAKE by sending the new "*Second Mailing*" notice dated 08-30-2002. Curiously, the Court, in framing the issues above, has completely ignored this very important and key evidentiary fact in the record. The Date of the Decision remains 05-17-2002. This attorney then

timely filed on 09-26-2002 a Petition for Review with this Court within thirty (30) days of receiving *actual* and *proper Notice from the BIA.*

ARGUMENT AND AUTHORITIES

The Court's prior Decision had addressed the Issue of whether or not the Petition for Review filed on September 26,2002 was timely from the May 17,2002 order if the "permanent rules" pursuant to INA Section 242 *et seq.* govern. It has been agreed that the permanent rules of INA Section 242 et. seq., 8 U.S.C. Section 1252(b)(1) govern this case. The answer is that the Petition for Review of the above named Petitioner was timely filed. The Court notes *Stone v. INS*, 514 U.S. at 405, 115 S. Ct. at 1549, but this case is simply not on point in that it concerns itself with the "tolling rule" when a Motion to Reconsider is filed. The key is whether "proper issuance" of the BIA's Decision was ever made before 08-30-2002, because if there is no "proper issuance" the thirty (30) day jurisdictional time limit to file the Petition for Review NEVER BEGAN TO RUN. Two (2) key cases are on point here: *Zaluski v. INS,* 37 F.3d 72 (2d Cir. 1994) and *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) The *Zaluski* case involved a Board of Immigration Appeal's (hereinafter BIA) mailing of their original Decision to the Petitioner attorney's old address and, once the BIA learned of the error, noting that the attorney had complied with 8 C.F.R. Sections 3.1(f) and 3.13 re, the procedures for notifying the BIA when he changed his address, the BIA corrected it, the *Zaluski* Court stating:

> " . . . It is clear from the record, however, that the BIA's decision was first mailed to Zaluski's council at a former address. The BIA apparently

> learned of the error and, on October 19,1993, mailed another copy of its decision to the lawyer's current address . . . "

This is exactly what has occurred in the instant case. The *Zaluski* Court notes at page 73 of the above cited case:

> " . . . *In this case, we conclude that we have jurisdiction. Zaluski's attorney followed the procedures for notifying the BIA when he changed his address,* a necessary step to *preserve his* ***right*** to receive timely notice of the decision . . . " (emphasis added)

The *Zaluski* Court continued at the same page stating the following:

> " . . . The BIA's regulations, which require service of its decision's specify that decisions be "mailed to the appropriate party". 8 C.F.R. Sections 3.1(f), 3.13. In this case, the decision was not "mailed to the appropriate party" (Zaluski's attorney) until October 19, when it was directed to him at the address he had duly recorded with the BIA. The petition for review was filed within 90 days of that date. Zaluski's petition therefore was timely filed, because ***"the time for filing a review petition begins to run when*** *the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's]* ***address of record."*** (emphasis added)

Again, the fact situation in *Zaluski* parallels that in the case before us. This situation with the decision date staying the same with the second Notice also occurred in *Zaluski.* (See a copy of the *Zaluski* case attached in the former case record).

The second case on point is *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996), decided August 30, 1996. The *Martinez-Serrano* Court distinguished *Stone v. INS*, 514 U.S. 386 (1995), at page 1258 of the opinion (see a copy attached) and noted on the same page in the right hand column that the issue:

> " . . . is *whether the time for filing the petition for review began to run* when the BIA mailed its decision denying the motion to reopen and reconsider to petitioner's representative's old address, *or when the BIA mailed its decision to the correct address.* More specifically, the *question is "what does "**the date of issuance**" mean in this context?* This Circuit has not dealt with this issue." (emphasis added)

"The Second and Fifth Circuits, however, have dealt directly with this issue and both have held that "the date of issuance" is the date the final deportation order was mailed to the correct address. *Zaluski v. INS*, 37 F.3d 72,73 (2d Cir. 1994); *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989).

In *Zaluski*, Zaluski's attorney followed the procedures for notifying the BIA when he changed his address. *Zaluski*, 37 F.3d at 73. The BIA nevertheless mailed its decision to Zaluski's counsel's former address. Id. Then, "the BIA apparently learned of the error and, . . . mailed another copy of its decision to the lawyer's current address." Id. The Second Circuit stated that the BIA's regulations, which require service of its decisions, specify that decisions be mailed to the appropriate party. Id. (quoting 8 C.F.R. Sections 3.1(f), 3.13).

It held the decision was not mailed to the appropriate party until it was directed to the address duly recorded

with the BIA. Id. "Time for filing a review petition begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's] address of record . . . "

The Ninth Circuit in *Martinez-Serrano* then notes how the case before it is exactly like the circumstances in *Zaluski*, finding that the BIA failed to comply with the terms of the federal regulations by mailing its decision to the incorrect address.

And, **importantly**, the *Martinez-Serrano* court addresses the INS argument, stating:

> " . . . The INS concedes that the facts in *Zaluski* are similar to the facts in this case, but contends that the Second and Fifth Circuits erroneously equated "issuance" of the final order with "service" of the order. The INS argues that petitioner had "more than ample time to file his petition for review within ninety days of the date noted on the decision. Petitioner's time to file a petition for review was shortened by a third of the time allotted for filing a review petition. He had sixty days, as opposed to ninety days, to file a review petition. The INS cites *Ashby Enterprises v, Weitzman, Dym & Assoc.* 780 F.2d. 1043 (D.C. Cir. 1986) for the proposition that the court clerk's failure to send notice of the Court's judgment to the defendant does not extend time for filing a notice of appeal . . . "

The Ninth Circuit concluded in *Martinez-Serrano* that *Zaluski* and *Ouedraogo* were the correct rule to adopt and so held. The *Martinez-Serrano* court said:

> " . . . The rule in *Zaluski* and *Ouedraogo* is sound because the petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations. The BIA had petitioner's representative's correct address, yet sent the decision to the wrong address. This Court therefore has jurisdiction to review the BIA's denial of the motion to reopen and reconsider."

Likewise, the 11th Circuit Court of Appeals had jurisdiction to hear the pending Petition For Review filed by the above named Petitioner on 09-26-2002, within thirty (30) days of proper Notice being furnished to this attorney.

The far reaching and devastating effects on all private practicing attorneys of any contrary ruling by this Court are made abundantly clear by the sole decision to the contrary by the U.S. Court of Appeals for the Seventh Circuit in *Nowak v. INS*, 94 F. 3d 390, 391 (7th Cir. 1996) wherein in relevant part the Court there stated that the time begins to run from issuance of the Decision by the BIA, not the mailing of the Decision, *and the burden is on counsel to periodically check with the BIA to ensure no Decision was rendered and erroneously mailed.* The *Nowak* Decision, with all due respect, defies common sense and any rational procedural system of ensuring fair, timely and proper service of Notice of the BIA's Decisions. Accountability of the BIA's Clerk's Office is totally absent. Every attorney in private practice would have to become the insurance company for the BIA Clerk's Office. Every attorney in private practice would have to notify the BIA every week or two to insure that no Decision was issued and no mistake was made. Such a result as the *Nowak* Decision defies logic, fundamental fairness, Due Process of law, and Equal Protection pursuant to the 14th and 15th Amendments to the U.S. Constitution and totally ignores the

existence of the Code of Federal Regulations for proper notice of Attorney's Address of Record as cited above. It is fundamental statutory construction that no statute or regulation can be interpreted to give no meaning to the statute or regulation at issue. Further, the *Nowak* Decision is penal in character as it cuts off the entire legal rights of parties and as such must be construed very strictly, not expansively.

CONCLUSION

Clearly the above facts, cases, law and regulations establish the proper jurisdiction of this Court in the above styled matter and the Petitioner respectfully requests that this Court Reverse the Decision of the Court entered on 01-06-2003 in the above styled matter and Grant Relief to the Petitioner pursuant to FRAP Rule 35 et. seq. and 11th Cir. Rule 35-1, et. seq. and Reverse the Decision of the U.S. Court of Appeals for the Eleventh Circuit entered 01-06-2003 and Reinstate proper jurisdiction in the above styled matter and any and all other remedies the Court deems proper.

Respectfully Submitted,

Judd James
Attorney for Petitioner
4437 Hollywood Blvd., Suite C
Hollywood, FL., 33021
Tel. 954-894-6700
Fax 954-893-0927
ATY 454
IL BAR No, 06181629
Admitted, 11th Cir. Ct. of
Appeals, 04-02-2002

CERTIFICATE OF COMPLIANCE

Pursuant to Eleventh Circuit Court of Appeals R. 35-1, et. seq., which references F.R.A.P. Rule 35, I certify that the Petitioner's Petition for Rehearing En Banc in Petitioner Shireen Wettergreen's Case, No. 02-15272-G, is less than fifteen (15) pages, exclusive of accompanying documents authorized by 11th Cir. R. 35, I.O.P.(2), and is therefore in compliance.

_____

Judd James, Esq.

* * *

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 02-15272-G

SHIREEN E. WETTERGREEN,
Petitioner
v.
JOHN ASHCROFT. ATTORNEY GENERAL,
Respondent

Petitioner's Response to Court Memorandum
Re Jurisdictional Questions

Judd B. James, Esq.
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FAX: 954-893-0927
Illinois Bar No. 06181629

CASE NO. 02-15272-G
Shireen Wettergreen, Petitioner v. John Ashcroft,
Attorney General, Respondent

CERTIFICATE OF INTERESTED PERSONS

The following is a complete list of persons who have an interest in the outcome of this particular case:

John Ashcroft, Attorney General, Respondent
David V. Bernal
John Bulger, INS District Director, Division VI
Angela Green
Hollywood Immigration Clinic, Inc., Judd James, Petitioner Counsel
Shireen Wettergreen
Walter Pollard, Clerk, U.S. 11th Circuit Ct. of Appeals
The Honorable Scott G. Alexander, Immigration Judge

STATEMENT REGARDING ORAL ARGUMENT

No request for Oral Argument is made nor will there be any request in the future.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style is: 14 pt. Times New Roman

* * *

STATEMENT OF JURISDICTION

This Court's jurisdiction is conferred by INA Section 242, 8 U.S.C. Section 1252 and jurisdiction below at the BIA was conferred by 8 C.F.R. Section 3.1(b) re the Appeal from the Decision of the Immigration Judge Denying Appellant's application for Relief from Removal/Deportation pursuant to INA Section 241(a)(1)(B), 8 U.S.C. Section 1251(a)(1)(B) – in United States in violation of law, remaining longer than permitted. Appellant filing for Asylum under INA Section 208(a) and Withholding of Removal under INA Section 241(b)(3), 8 U.S.C. Sections 1158 and 1251(b)(3), respectively.

STATEMENT OF THE ISSUES

ISSUES NO.

1. **What law governs judicial review of this petition for review:**

A. The "permanent rules" in Immigration and Nationality Act ("INA") Section 242 *et seq.* (8 U.S.C. Section 1252 *et seq.*), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") Section 306(a)(2), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30,1996); or

B. The "transitional rules" in INA Section 106 (8 U.S.C. Section 1105a) and IIRIRA Section 309(c)(4) (note to 8 U.S.C. Section 1101)?

See IIRIRA Section 306(c)(1), 309(a) & (c)(1), as amended by technical correction Pub.L. 104-302, Section 2, 110 Stat. 3657 (Oct. 11, 1996); *Lettman v. Reno*, 168 F. 3d 463 (11th Cir.), *Vacated in part and reh'g granted*, 185 F. 3d 1216 (11th Cir. 1999).

II. **Timeliness**

A. If the transitional rules govern, whether the petition for review, filed on September 26,2002, was timely from the May 17,2002, order? See Section 309(c)(4)(C); Fed.R. App.P. 15(a)(1) & 26(b)(2); *Stone v. INS*, 514 U.S. 386, 405, 115 S. Ct. 1537, 1549, 131 L. Ed.2d 465 (1995).

B. If the Permanent rules govern, whether the petition for review, filed on September 26,2002, was timely from the May 17,2002, order? *See* INA Section 242(b)(1); Fed.R.App.P. 15(a)(1) & 26(b)(2); *Stone*, 514 U.S. at 405, 115 S.Ct. at 1549.

ISSUE NO. 1
What law governs judicial review of this Petition For Review?

The counsel for the Petitioner has reviewed parts "A" and "B" of Issue No. 1 re the "permanent rules" pursuant to Section 242 *et seq.* of the Immigration and Nationality Act (hereinafter "INA") (8 U.S.C. Section 1252 *et seq.*), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") Section 306(a)(2), Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30,1996) and the "transitional rules" pursuant to INA Section 106 (8 U.S.C. Section 1105 a) and IIRIRA Section 309(c)(4) (note to 8 U.S.C. Section 1101 and it is our position that the "permanent rules" under Part A of Issue No. 1 applies for the following reasons.

Please see attached a copy of West Group's Immigration Legislation Handbook, pages 7-1 and 7-2, 7-14 through 7-16, re Judicial Review of Removal Orders. At page 7-14 it notes in relevant part:

> " . . . the 1996 Act repealed completely Section 106 of the INA, and replaced it with new Section 242 of the INA, which governs judicial review for aliens placed in the new removal proceedings mandated by the new law beginning on April 1, 1997. Alien's who were placed in the old exclusion or deportation proceedings prior to April, 1997 fall into two groups with regard to judicial review rights . . . "

The Petitioner, Shireen Wettergreen, and her family members were all issued a Notice to Appear (hereinafter NTA) on June 12,1997. A copy of the NTA and INS Referral Notice were included with the Petition for Review filed September 26,2002, along with a copy of the Decision of

the Immigration Judge dated January 5,1998. Consequently, the Petitioner's case is governed by the "permanent rule" of INA Section 242 *et seq.* which requires that the Petition for Review be filed within thirty (30) days after the date of *issuance* of the final removal order. (See West Group Immigration Legislation Handbook at page 7-16).

ISSUE NO. 2
Timeliness

The Court herein asks if the Petition for Review filed on September 26, 2002 was timely from the May 17,2002 order if the "permanent rules" pursuant to INA Section 242 *et seq.* govern. The answer is that the Petition for Review of the above named Petitioner was timely filed. The Court notes *Stone v. INS*, 514 U.S. at 405, 115 S. Ct. at 1549, but this case is simply not on point in that it concerns itself with the "tolling rule" when a Motion to Reconsider is filed. This is not the case at issue. Two (2) key cases are on point here: *Zaluski v. INS,* 37 F.3d 72 (2d Cir. 1994) and *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) The *Zaluski* case involved a Board of Immigration Appeal's (hereinafter BIA) mailing of their original Decision to the Petitioner attorney's old address and, once the BIA learned of the error, noting that the attorney had complied with 8 C.F.R. Sections 3.1(f) and 3.13 re, the procedures for notifying the BIA when he changed his address, the BIA corrected it, the *Zaluski* Court stating:

> " . . . It is clear from the record, however, that the BIA's decision was first mailed to Zaluski's council at a former address. The BIA apparently learned of the error and, on October

> 19,1993, mailed another copy of its decision to the lawyer's current address . . . "

This is exactly what has occurred in the instant case. The BIA mailed a copy of its Notice, dated 05-17-2002, of the Decision dated 5-17-2002 on 05-17-2002 and it was returned to the BIA, as the copy of the returned envelope attached to the Decision included with the Petition for Review shows. The address of this attorney on the 05-17-2002 Notice of Decision is this attorney's *former address* at 4000 Hollywood Blvd., Suite 350, Hollywood, FL. 33021. This attorney filed a proper Change of Address Notice with the BIA on June 16,1998 on Form EOIR-33/BIA, via the U.S.. Postal Service, Express Mail, Overnight Service, Certified, Return Receipt Requested. Please see attached a complete copy, (pages 1-5, part of which is in color) of this attorney's Cover Letter, on Letterhead, to the BIA, referencing the Form EOIR-33/BIA Change of Address Notice, signed by this attorney; the color copy of the U.S.P.S. Express Mail Receipt, No. EE 650227145 US, postmarked June 17,1998; an executed copy of the Form EOIR-33/BIA Change of Address Form noting this attorney's old address (the same address the first Notice of Decision by the BIA was sent to on 05-17-2002) and this attorney's new (and current) address of 4437 Hollywood Blvd., Suite C, Hollywood, FL., 33021; with a copy of the *signed* Certified Mail, Return Receipt Card, and *stamped* on the reverse side: "Received Department of Justice, Executive Office For Immigration Review-1998, June 18 P 1:28, Board of Immigration Appeals, Office of the Clerk; with the last page being the reverse side of the Form EOIR-33/BIA.

The *Zaluski* Court notes at page 73 of the above cited case:

> " . . . *In this case, we conclude that we have jurisdiction. Zaluski's attorney followed the procedures for notifying the BIA when he changed his address,* a necessary step to *preserve his* ***right*** to receive timely notice of the decision . . . " (emphasis added)

The *Zaluski* Court continued at the same page stating the following:

> " . . . The BIA's regulations, which require service of its decisions specify that decisions be "mailed to the appropriate party". 8 C.F.R. Sections 3.1(f), 3.13. In this case, the decision was not "mailed to the appropriate party" (Zaluski's attorney) until October 19, when it was directed to him at the address he had duly recorded with the BIA. The petition for review was filed within 90 days of that date. Zaluski's petition therefore was timely filed, because ***"the time for filing a review petition begins to run when*** *the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's]* ***address of record.***" (emphasis added)

Again, the fact situation in *Zaluski* parallels that in the case before us. On August 30, 2002, the BIA on its own initiative sent a Second Mailing notice in the above case to this attorney at his current address which is and has been since 06-18-1998, his address of record, the address at 4437 Hollywood Blvd., Suite C, Hollywood, FL. 33021. ***Please note*** the *"Special Stamps"* in the lower right corner of the BIA Notice of 08-30-2002, where it states:

> "Board of Immigration Appeals
> SECOND MAILING
> Date: 08/30/2002
> Initials: D L S"

Obviously the BIA recognized its error on its own and without any Motion or other action; apparently, moved to CORRECT ITS MISTAKE by sending the new *'second Mailing"* notice dated 08-30-2002. Curiously, the Court, in framing the issues above, has completely ignored this very important and key evidentiary fact in the record. The Date of the Decision remains 05-17-2002. This situation with the decision date staying the same with the second Notice also occurred in *Zaluski.* (See a copy of the *Zaluski* case attached).

The second case on point is *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996), decided August 30, 1996. The *Martinez-Serrano* Court distinguished *Stone v. INS*, 514 U.S. 386 (1995), at page 1258 of the opinion (see a copy attached) and noted on the same page in the right hand column that the issue:

> " . . . is *whether the time for filing the petition for review began to run* when the BIA mailed its decision denying the motion to reopen and reconsider to petitioner's representative's old address, *or when the BIA mailed its decision to the correct address.* More specifically, the *question is "what does "**the date of issuance**" mean in this context?* This Circuit has not dealt with this issue." (emphasis added)

"The Second and Fifth Circuits, however, have dealt directly with this issue and both have held that "the date of issuance" is the date the final deportation order was mailed to the correct address. *Zaluski v. INS*, 37 F.3d 72,73 (2d Cir. 1994); *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989).

In *Zaluski*, Zaluski's attorney followed the procedures for notifying the BIA when he changed his address.

Zaluski, 37 F.3d at 73. The BIA nevertheless mailed its decision to Zaluski's counsel's former address. Id. Then, "the BIA apparently learned of the error and, . . . mailed another copy of its decision to the lawyer's current address." Id. The Second Circuit stated that the BIA's regulations, which require service of its decisions, specify that decisions be mailed to the appropriate party. Id. (quoting 8 C.F.R. Sections 3.1(f), 3.13).

It held the decision was not mailed to the appropriate party until it was directed to the address duly recorded with the BIA. Id. "Time for filing a review petition begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's] address of record . . . "

The Ninth Circuit in *Martinez-Serrano* then notes how the case before it is exactly like the circumstances in *Zaluski*, finding that the BIA failed to comply with the terms of the federal regulations by mailing its decision to the incorrect address.

And, **importantly**, the *Martinez-Serrano* court addresses the INS argument, stating:

> " . . . The INS concedes that the facts in *Zaluski* are similar to the facts in this case, but contends that the Second and Fifth Circuits erroneously equated "issuance" of the final order with "service" of the order. The INS argues that petitioner had "more than ample time to file his petition for review within ninety days of the date noted on the decision. Petitioner's time to file a petition for review was shortened by a third of the time allotted for filing a review petition. He had sixty days, as opposed to ninety days, to file

> a review petition. The INS cites *Ashby Enterprises v, Weitzman, Dym & Assoc.* 780 F.2d. 1043 (D.C. Cir. 1986) for the proposition that the court clerk's failure to send notice of the Court's judgment to the defendant does not extend time for filing a notice of appeal . . . "

The Ninth Circuit concluded in *Martinez-Serrano* that *Zaluski* and *Ouedraogo* were the correct rule to adopt and so held. The *Martinez-Serrano* court said:

> " . . . The rule in *Zaluski* and *Ouedraogo* is sound because the petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations. The BIA had petitioner's representative's correct address, yet sent the decision to the wrong address. This Court therefore has jurisdiction to review the BIA's denial of the motion to reopen and reconsider."

Likewise, the 11th Circuit Court of Appeals has jurisdiction to hear the pending Petition For Review filed by the above named Petitioner on 09-26-2002, within thirty (30) days of proper Notice being furnished to this attorney.

Should any other construction of INA Section 242 *et seq.* or the BIA regulations reach a result not consistent and in complete harmony with *Zaluski* and *Martinez-Serrano* as well as 8 C.F.R. Sections 3.1(f) and 3.13, then, in addition to the above arguments, Petitioner cites rights to Due Process under the 5th and 14th Amendments to the U.S. Constitution as the contrary interpretation, statute or regulation would shift the burden from the BIA (and the BIA Court Clerk's Office) to counsel or petitioner to have to constantly monitor the BIA, for years in some cases.

Such a consequence can only be seen as an unconstitutional infringement of the Due Process rights to fair and proper Notice as well as a violation of basic fundamental rights. Just because a misled and misguided Congress or Attorney General may have the "power" to pass a statute or issue a regulation does not make it comport with Due Process or what is fundamentally right. This is a lesson that was sorely lost on his Majesty King George III of England when the British Parliament had taxation without representation. The Petitioner also cites Estoppel theory as applying to the actions by the BIA in sending the 05-17-2002 Notice of Decision to this attorney's former, and incorrect address, despite the BIA having this attorney's correct address. We specifically reserve the above Due Process, Fundamental Fairness and Estoppel issues for appeal, in addition to the prior above analysis should a result inconsistent with *Zaluski* and *Martinez-Serrano* occur. Please see attached copies of the following BIA Decisions sent *properly* to this attorney's address since March, 2002, along with file stamped copies of the Petition for Review filed with the 11th Circuit Court of Appeals: 1) Valerly Skavish v. Attorney General, 11th Circuit Case No. 02-12126; 2) Vernon La Cock v. Attorney General, 11th Circuit Case No. 02-139081; 3) Djordje Lezajic vs. Attorney General, 11th Circuit Case No. 02-15067B; and 4) a copy of a BIA Decision only re Deon Hamilton Strydom, A 76-893-477. All of the BIA Decision notices from March to October, 2002, above, were sent to this attorney's *correct* address of record.

Clearly the above facts, cases, law and regulations establish the proper jurisdiction of this Court in the above styled matter.

Respectfully Submitted,

Judd James
Attorney for Petitioner
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Tel. 954-894-6700
Fax 954-893-0927
ATY 454
IL BAR No, 06181629
Admitted, 11th Cir. Ct. of
Appeals, 04-02-2002

CERTIFICATE OF COMPLIANCE

Pursuant to Eleventh Circuit Court of Appeals R. 27-1(M), which references FRAP Rule 27, I certify that the Petitioner's Response to Court Memorandum re Jurisdictional Questions herein in Petitioner Shireen Wettergreen's, Case No. 02-15272-G, is less than twenty (20) pages, exclusive of accompanying documents authorized by Rule 27(a)(2)(B) and therefore in compliance.

Judd James, Esq.

* * *

APPENDIX H

NEW CASE FILING

Court of Appeals for the Eleventh Circuit

Shireen E. Wettergreen
Petitioner
v.
John Ashcroft, Attorney General,
Respondent.

Petition for Review

On Appeal from the Board of Immigration Appeals

Judd B. James, Esq.
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd., Suite C
Hollywood, FL 33021
Tel: 945-894-6700
Fax: 954-893-0927

AO 182 ORIGINAL 33108
(Rev. 10/89) RECEIPT FOR PAYMENT
UNITED STATES COURT OF APPEALS
for the
ELEVENTH CIRCUIT
at Atlanta, GA
RECEIVED FROM Shireen E. Wettergreen
374 N.E. 45th Street
Pompano Beach, FL 33064

		ACCOUNT	AMOUNT
GENERAL AND SPECIAL FUND		086900	100.00
086900	Docketing Fees		
322340	Sales of Publications & Opinions		
322350	Copy Fees		
322360	Miscellaneous (include certification fee)		
		TOTAL	100.00

Case number or other reference
Petition for Review
A75-350-064
USCA #02-15272

Mail

All checks, money orders, drafts, etc. are accepted subject to collection. Full credit will not be given until the negotiable instrument has been accepted by the financial institution on which it was drawn.

04758374520

Deputy Clerk

Date 9/26 2002 Cash Check MO X /s (illegible) Patterson

Photocopy of U.S.P.S. Postal Money Order No. 04758374520 in the amount of $100.00, made payable to Clerk, U.S. Ct. of Appeals, 11th Circuit, used for Appeal filing fee, From: Shireen E. Wettergreen, 374 N.E. 45th Street, Pompano Beach, FL 33064, A075-350-064, 954-785-9783.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Shireen E. Wettergreen,	)
Petitioner	) **Petition for Review**
	) Agency Case No.
v.	) A75-350-064
John Ashcroft, Attorney General,	) Riders: 75-350-065,
	) 75-350-066
	) 75-350-067,
Respondent	) 75-350-068,
	) 75-350-069,
	) 75-350-070.
	/

Petition for Review

The Petitioner, Shireen E. Wettergreen, hereby petitions this Court for review of the attached final order of the Board of Immigration Appeals entered against her on August 30, 2002. The validity of this order has not been upheld by any court.

Respectfully submitted,
Judd B. James, Esq.
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd., Suite C
Hollywood, FL 33021
Telephone:(954) 894-6700
Facsimile:(954) 893-0927

By: /s Judd B. James, Esq.
Judd B. James, ESQ.
Illinois Bar No. 06181629
Admitted to 11th Circuit
Ct. of Appeals 04-02-2002

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Appearance of Counsel Form
TO ENTER AN APPEARANCE, PLEASE COMPLETE AND RETURN THIS FORM WITHIN 14 DAYS. YOU MAY NOT RECEIVE FURTHER NOTICE OF PROCEEDINGS ON APPEAL UNLESS THIS FORM S TIMELY FILED.

Please Type or Print No. _____
Shireen E. Wettergreen, Petitioner vs. *John Ashcroft, Attorney General, Respondent*

The Clerk will enter my appearance for these named parties: Shireen E. Wettergreen
In this court these parties are
[ ] appellant(s)
[X] petitioner(s)
[ ] intervenor(s)
[ ] appellee(s)
[ ] respondent(s)
[ ] amicus curiae

[ ] The following related or similar cases are pending on the docket of this court: None
[ ] This appeal is entitled to preference for the following reasons: None
Signature: /s Judd B. James
Social Sec. No.: 345-40-7918
Name (Type or Print): Judd B. James
Firm/Govt. Office: Hollywood Immigration Clinic, Inc.
Phone: 954-894-6700
Street Address: 4437 Hollywood Blvd., Suite C
City: Hollywood State: FL Zip: 33021

To enter an appearance you must be an 11th Circuit bar member, seek admission (form below), or be exempt under 11th Cir. R. 46-1(a) (see reverse)

* * *

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(2)

FILED
NOV 19 2003

No. 03-269

In the Supreme Court of the United States

SHIREEN E. WETTERGREEN, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
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BEST AVAILABLE COPY

QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1252(b)(1), provides that petitions for review of administrative orders of removal must be filed in the appropriate court of appeals "not later than 30 days after the date of the final order of removal." The question in this case is whether, when the Board of Immigration Appeals initially mailed its final removal order to the alien at an incorrect address, the statutory 30-day period nevertheless began to run on the date of the order.

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In the Supreme Court of the United States

No. 03-269

SHIREEN E. WETTERGREEN, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 4-6) is unreported. The order of the Board of Immigration Appeals (Pet. App. 11-14) and the decision of the immigration judge (Pet. App. 15-32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2003. A petition for rehearing was denied on March 18, 2003 (Pet. App. 1-3). The petition for a writ of certiorari was filed on June 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No.

104-208, Div. C, 110 Stat. 3009-546, a petition for judicial review of a deportation order of the Board of Immigration Appeals (BIA) had to be filed in the appropriate court of appeals "not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony * * *, not later than 30 days after the issuance of such order." 8 U.S.C. 1105a(a)(1) (1994). IIRIRA established, among its other reforms, a new form of immigration proceeding (known as "removal") that applies to aliens who have entered the United States but are deportable, as well as to aliens who are inadmissible at the border. See 8 U.S.C. 1229, 1229a. IIRIRA also repealed the former 8 U.S.C. 1105a(a)(1) and substituted a new provision specifying that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1).

2. Petitioner is a native and citizen of South Africa. Pet. App. 17. In 1994, she and her family were admitted to the United States after her husband obtained a visa as a non-immigrant temporary worker. *Id.* at 17-18. Petitioner did not leave the United States when her authorization to be in this country expired. *Id.* at 18. In June 1997, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner and her family under 8 U.S.C. 1227(a)(1)(B). Pet. App. 17.

At her removal hearing before an immigration judge, petitioner conceded that she is removable from the United States but applied for asylum under 8 U.S.C. 1158, as well as withholding of removal under 8 U.S.C. 1231(b)(3). Pet. App. 17. In seeking relief from removal, petitioner asserted that, as a white South African, she would be persecuted in South Africa on account of her race. See *id.* at 18-23. The immigration judge

denied petitioner's applications and ordered her removed to South Africa unless she departed voluntarily. *Id.* at 23-29.

3. On May 17, 2002, the BIA dismissed petitioner's administrative appeal and ordered petitioner removed if she did not depart voluntarily. Pet. App. 12-14. The BIA determined that petitioner's claim for relief from removal "is based solely upon the general state of violence and lawlessness in South Africa stemming from the May 1994 change in government" and that the record evidence showed that "individuals such as [petitioner], i.e. apolitical white men and women, are far less likely to be the victims of violence and crime" than other segments of the South African population. *Id.* at 13.

On the day the BIA entered its decision, May 17, 2002, it mailed a copy of the decision to petitioner's counsel of record at 4000 Hollywood Boulevard, in Hollywood, Florida. Pet. App. 39; see *id.* at 11.* Petitioner asserts that, in June 1998, her counsel had filed a change of address notice with the BIA, giving a new address of 4437 Hollywood Boulevard. Pet. 3-4. On August 30, 2002, the BIA sent a "second mailing" of the May 17, 2002, decision to petitioner's counsel at 4437 Hollywood Boulevard. Pet. App. 10.

4. On September 26, 2002, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a petition for review of the BIA's final order of removal. Pet. App. 61-62. On October 10, 2002, the

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* The Petition Appendix (at 11) indicates that the BIA's May 17, 2002, notice was mailed to 4437 Hollywood Boulevard. Government records and petitioner's own submission in the court of appeals indicate that the May 17, 2002, notice was mailed to 4000 Hollywood Boulevard.

court of appeals notified the parties that "it appears this court may lack jurisdiction over this appeal" and asked the parties to address whether IIRIRA's 30-day filing deadline, 8 U.S.C. 1252(b)(1), applies to petitioner's case and whether the petition for review was timely filed. Pet. App. 7; see *id.* at 8-9. Petitioner responded through her counsel that the 30-day deadline of Section 1252(b)(1) does apply. *Id.* at 52. She argued, however, that the petition for review was timely filed, and the court of appeals had jurisdiction to consider her case on the merits, because the petition for review was filed "within thirty (30) days of proper Notice being furnished to [her] attorney" through the August 30, 2002, second mailing. *Id.* at 58.

The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 4-6. The court explained that "[t]o be timely, the petition should have been filed within thirty (30) days of the Board of Immigration Appeals's May 17, 2002, final order of removal. See 8 U.S.C. § 1252(b)(1). The petition, filed on September 26, 2002, is untimely." Pet. App. 4.

ARGUMENT

The court of appeals correctly applied 8 U.S.C. 1252(b)(1), and its application of the statute does not conflict with any decision of this Court or any other court of appeals. Furthermore, petitioner had remedies that might have allowed her to maintain a timely petition for review in the court of appeals. The Board of Immigration Appeals has prospectively addressed situations like petitioner's through new agency procedures governing second mailings of BIA decisions. For all those reasons, review of the unpublished order of the court of appeals is not warranted.

1. The plain language of 8 U.S.C. 1252(b)(1) states that an alien's petition for review of a final order of removal "must be filed not later than 30 days after the date of the final order." The date of the BIA's final order in petitioner's case, as stated on the order itself, was May 17, 2002. Pet. App. 12. Accordingly, petitioner's petition for judicial review was untimely.

2. Petitioner contends (Pet. 5-9) that the court of appeals' rejection of her proposed reading of Section 1252(b)(1)—*i.e.*, that the time for filing a petition for review begins to run upon the BIA's "proper" mailing of its order, Pet. 5—conflicts with decisions of the Second, Fifth, and Ninth Circuits. Petitioner is mistaken.

In *Martinez-Serrano* v. *INS*, 94 F.3d 1256 (9th Cir. 1996), cert. denied, 522 U.S. 809 (1997), and *Zaluski* v. *INS*, 37 F.3d 72 (2d Cir. 1994), the courts found petitions for review timely on facts similar to those here. Those cases, however, arose under 8 U.S.C. 1105a(a)(1) (1994), which provided that petitions for review had to be filed within 90 days (or 30 days in some cases) "after *the date of the issuance* of the final deportation order" (emphasis added). The dispute in those cases involved whether a BIA order could be "issued" under that former provision before it was served in accordance with agency regulations. See *Martinez-Serrano*, 94 F.3d at 1258-1259; *Zaluski*, 37 F.3d at 73. By contrast, issuance of the BIA's decision is not material to applying the filing deadline in current Section 1252(b)(1), which governs this case.

Ouedraogo v. *INS*, 864 F.2d 376 (5th Cir. 1989), arose under an even earlier version of the judicial-review provision. See *id.* at 378 & n.2. Like current Section 1252(b)(1), that version made "the date of the [BIA's] final * * * order" the relevant date for calculating the

filing deadline. 8 U.S.C. 1105a(a)(1) (1982). The Fifth Circuit determined that "the time for filing a review petition begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's address of record." 864 F.3d at 378; see 8 C.F.R. 3.1(f) (1988 & 2003). The Seventh Circuit subsequently criticized *Ouedraogo* as an incorrect application of former Section 1105a(a)(1) and noted that *Ouedraogo* is inconsistent with this Court's statement in *Stone* v. *INS*, 514 U.S. 386, 405 (1995), that Section 1105a(a)(1) established a "jurisdictional" rule that had to be "construed with strict fidelity to [its] terms." See *Nowak* v. *INS*, 94 F.3d 390, 391-392 (7th Cir. 1996). The Fifth Circuit has not applied *Ouedraogo* to current Section 1252(b)(1), nor has it ever considered whether the filing rule stated in *Ouedraogo* under former Section 1105a(a)(1) survived the later decision in *Stone*. Accordingly, there is no circuit conflict concerning the correct application of current Section 1252(b)(1).

3. Petitioner argues (Pet. 9) that applying Section 1252(b)(1) as written in a case such as this, to require the filing of a petition for judicial review within 30 days of the BIA's final order of removal, has "far-reaching and devastating effects." That is not so, for a number of reasons.

First, as the Seventh Circuit explained in *Nowak*, an alien or her counsel may check periodically whether the BIA has ordered the alien removed from the United States. See 94 F.3d at 391.

Second, petitioner had potential remedies even after she failed to check the BIA's docket within the 30-day period for filing a petition for review. If petitioner had checked the docket within 90 days of the BIA's decision, *i.e.*, by August 15, 2002, she could have filed a timely motion to reopen asking the BIA to reissue its

removal order and thereby allow the filing of a timely petition for judicial review. See 8 C.F.R. 3.2(c)(2) (2003). Furthermore, even after she received notice of the May 17, 2002, removal order, petitioner could have asked the INS to join with her in filing a motion to reopen; if the INS had agreed, the joint motion would have been timely. See 8 C.F.R. 3.2(c)(3)(iii) (2003).

Finally, on June 20, 2003, the Office of the Clerk of the BIA adopted Administrative Directive 03-02, which established new internal operating procedures relevant to this case. In circumstances like the ones in this case, or when a mailing error is brought to the BIA's attention by a party, the new procedures require the Clerk's Office to re-date and reissue the BIA's removal order as of the date of the second mailing to the alien. That new procedure should prospectively resolve the policy concerns discussed in the instant petition for a writ of certiorari.

For the foregoing reasons, this case presents no issue of ongoing significance warranting review by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

NOVEMBER 2003